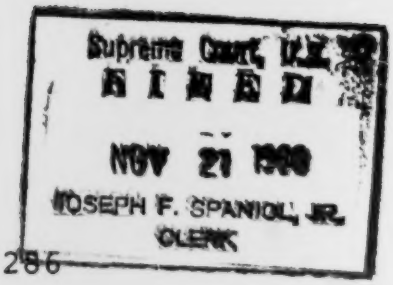
(1)

90-840



No. A-286

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID LARRY FRASER, Petitioner,

v.

UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

D. Larry Fraser
10850 SW 112 Ave.
Miami, FL 33176
(305) 595-5533
Pro Se

November 21, 1990

QUESTIONS PRESENTED

1. Does a Military Reservist have a legally protected right to participate in those activities which the statutes and regulations require for the maintenance of Military readiness, for continued membership in the Reserves, for the receipt of pay, and/or to qualify for deferred retirement benefits?

2. Is it error for the United States Claims Court to dismiss a complaint, by Summary Judgment, when there are important allegations in the complaint which can not, or have not, be resolved by the facts in the record and where the loss of ancillary jurisdiction may preclude litigation of some of these unresolved issues.

3. Are the standards of the "half-a-loaf" doctrine, in the Claims Court, too broad to be applied with consistency?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	
I. The right of military reservists to participate in the Reserves is fundamental to the accomplishment of National objectives and to the welfare of all Reservists.	24
II. Judicial Efficiency and fundamental fairness dictate that all important issues must be resolved or remanded, particularly where loss of ancillary jurisdiction may preclude future litigation.	35
III. The standards of the Half-a-loaf doctrine in the claims court are too broad to be consistent	42
CONCLUSION	51
APPENDIX	App.

TABLE OF AUTHORITIES

Cases:

Armstrong v. United States, 205 Ct. Cl. a754 (1976).....34

Collins v. United States, 14 Cl. Ct. 746, aff'd,865 F.2d 269 (Fed. Cir. 1988).....43, 48

Debow v. United States, 193 Ct. Cl. 499 (1970).....42

Denton v. United States, 204 Ct. Cl. 188 (1974).....48

Duhon v. United States, 198 Ct. Cl.564 (1972).....47

Hankins v. United States, 183 Ct. Cl. 34 (1968).....42

Herzog v. United States, 167 Ct. Cl, 337 (1964).....34

Homcy v. United States, 210 Ct. Cl. 332 ((1976).....49

Olenick v. Brucker, 173 F.Sup. 493 (1959.....24

Sanders v. United States, 219 Ct. Cl. 285 (1979).....40, 42

Skinner v. United States, 219 Ct. Cl. 322 (1979).....23

United States v. Testan, 424 U.S. 392 (1976).....33

Yee v. United States, 210 Ct. Cl. 752 (1975).....34, 47

Miscellaneous:

Coast Guard Law Bulliten, June, 1980.....45

1952 U.S. Cong. and Ad. News...27

Note: References to the appendix are indicated by (App. X), where "X"is the page number.

OPINIONS DELIVERED BELOW

There are no reported opinions.

The following opinions are reprinted in the Appendix:

1. The July 24, 1990 Decision of the United Stated Court of Appeals for the Federal Circuit. (App. 4)

2. Orders of the United States Claims Court dated October 24, 1989 (App. 66); September 14, 1989 (App. 63); August 17, 1989 (App. 65); April 3, 1989 (App. 22); and May 9, 1988 (App. 14).

3. The November 21, 1880 Board for Corrections of Naval Records review and recommendation report (App. 4).

JURISDICTION

The date of entry of the Judgment of the United States Court of Appeals for the Federal Circuit is July 24, 1990. The decision there affirmed a October 25, 1989 Judgment of the United States Claims Court which had jurisdiction under 28 U.S.C. 1491.

On October 17, 1990, Chief Justice Renquist ordered that the time for filing this petition be extended to and including November 21, 1990.

The Jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions, Statutes, and Regulations involved

Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics an Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

10 U.S.C. 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the Case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative.

However, if no demand for payment is made by a legal representative, the shall be paid--(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment; (2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or (3) as otherwise prescribed by the law applicable to that kind of payment. A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

10 U.S.C. 262. Purpose

The purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergence and at such other times as the national security requires, to fill needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components.

10 U.S.C. 278. Dissemination of information

The Secretary of Defense shall require the complete and current dissemination, to all Reserves and to the public, of information of interest to the reserve components.

10 U.S.C. 273. Standby Reserve: composition; inactive status list

(a) The Standby Reserve consists of those units or members , or both, of the reserve components, other than those in the Ready Reserve or Retired Reserve, who are liable for active duty only as provided in sections 672 and 674 of this title.

(b) An inactive status list shall be maintained in the Standby Reserve. Whenever an authority designated by the Secretary concerned considers that it is in the best interest of the armed force concerned, a member in the Standby Reserve who is not required to remain a Reserve, and who cannot participate in prescribed training, may, if qualified, be transferred to the inactive status list under regulations to be prescribed

by the Secretary concerned. These regulations shall fix the conditions under which such a member is entitled to be returned to an active status.

(c) While in an inactive status, a Reserve is not eligible for pay or promotion.

10 U.S.C. 277. Regular and reserve components: discrimination prohibited

Laws applying to both Regulars and reserves shall be administered without discrimination---(1) among Regulars; (2) among Reserves; and (3) between Regulars and Reserves.

STATEMENT OF THE CASE

After five years of active duty, and completion of all obligated duty, petitioner was discharged from the U.S. Marine Corps in September of 1967 and accepted a Captain's commission in the Marine Corps Reserve. He was provided no specific information regarding his Reserve obligations or how to fulfill them but informed the Marine Corps that his remoteness (about 350 miles) from an active Marine Reserve Aviation unit,

and the nature of his work, would inhibit his potential USMCR activity.

In August of 1988, petitioner went to work as a pilot for Air America in S.E. Asia. That September he informed the USMCR that his work and his remote location would make him unavailable for Reserve training sessions and stated that the fact that he and his family were now located in S.E. Asia could impose a personal hardship if he were mobilized, but he did not request exemption or delay if mobilized. In late 1987, and at several other times until 1971, petitioner contacted the USMCR to ask if there was anything he could do to become an active participant in the Reserve. He was informed (erroneously) that, as long as he was outside the United States, there was no way to

participate.[1]

In the summer of 1971, petitioner was notified by the USMCR that they were planning to discharge him because of inactivity. He reminded them of his situation, asked to be retained, and indicated that he would attempt to do whatever was necessary to be retained. In September, 1971, he was notified that a disposition board had recommended that he be discharged. He replied that he wished to appeal the recommendation and that "Once again, I am more that willing to participate with an active unit in the Far East

---

1. Petitioner had been moved from an Active Status List (ASL) to an Inactive Status List (ISL) in Sept., 1968. A Reservist must be in the ASL to participate (10 U.S.C. 273). A Reservist requesting participation is, therefor, necessarily, requesting membership in the ASL, whether he knows it of not. There are several ways to participate when in the ASL: 1. Belong to an active reserve unit, 2, occasional duty with active or reserve units, 3. Take correspondence courses. or otherwise qualify for retention in

any way possible. I need, however, your advisement on how I may do this and the procedures involved." On November 4th he was notified that there was no provision for appeal, and on November 17, 1971 he was discharged.

In 1974, petitioner returned to the United States. He became a member of the U.S. Army National Guard in January of 1976 as a Chief Warrant Officer.

In 1977 Petitioner was invited by the Commander of a Marine Corps Reserve Rifle Company to affiliate with his Command. Petitioner attempted, therefor, to transfer to the USMCR at his old rank of Captain, and he obtained a release from the ARNG conditioned upon his entry into the USMCR. The Marine Corps, however, would not consider his request unless and until he became discharged from the Army National Guard, and they refused to indicate how they would respond to

such an application once a discharge from the ARNG was completed. When asked for an explaination, Headquarters, Marine Corps responded:

> "The Director, Judge Advocate Division, has advised that you may not be reinstated in the Marine Corps Reserve (as opposed to reappointment) because to do so would be in violation of the statute which forbids a person from holding a commission in two branches of the service at the same time. The Director, Judge Advocate Division, has further advised that a conditional release from the National Guard would not suffice in that it would not sever you from your present status as a Chief Warrant Officer in the Nation Guard.
>
> "Therefore, the two options which remain available to you are those which have been described in previous correspondence, i.e. inter-service transfer as a CWO, resignation of your commission as a CWO in the Guard and application for reappointment in the Marine Corps Reserve."

(All this is recorded here because there has been much confusion by the Government, and the Courts below, regarding what the petitioner could have, or should have, done to resolve his status of being commissioned in two services at the same time. This "dual-status" resulted from a Military Corrections

Board action that will be detailed in the next few paragraphs. There was no dual-status before the Corrections board and the Corrections Board's actions had nothing to do with this 1977-1979 transfer application.) (App. 26, 61)

On June 10, 1979, the petitioner, having learned that the Marine Corps had misinformed him A. that there was no means for participation in the Reserves while outside the U.S., and B. that there was no means to appeal the discharge decision, submitted an application to the Board for Correction of Naval Records.[2] This Correction Board application requested to be put, as nearly as possible, in

---

2. The petitioner also learned that there were serious procedural deficiencies in the Disposition Board's proceedings-- likely made inevitable by processing scores, sometimes hundreds, of files with a Disposition Board assembled every four months for a single day.

the position the petitioner would have been if he had received accurate information by: a. an invalidation of the discharge and reinstatement in the USMCR, b. instatement of rank and retirement credit as though full satisfactory participation in the Reserves had actually occurred, and c. compensation for loss of pecuniary benefits which would have been received if he had satisfactorily accomplished the Reserve participation he could reasonably have completed if he had been correctly advised of his options. (Military Corrections Boards have the power to change records so as to give credit for service not actually performed--this is called "constructive" credit or service.)

The Corrections Board first summarily dismissed the application (the petitioner has reason to believe that this was because of the mistaken belief that

the Marine Corps would not recommend corrective action), then, when Headquarters Marine Corps submitted a recommendation for remedial action, the Board withdrew the dismissal and recommended to the Secretary of the Navy that the petitioner be reinstated but that all other requests be denied. The Board's findings concluded:

> "Upon review and consideration of all the evidence of record the Board now finds the existence of an injustice warranting corrective action(.) (T)he Board's finding in this regard is based upon petitioner's overall record and particularly the fact that he was never made aware of either his Reserve Obligations or options available for fulfilling those obligations, despite his attempts to discover them."

The Board also recommended that the Secretary take action with regard to the Marine Corps' recommendation (presumably this is with regard to the sstatement in the USMC's letter to the Board that:

> "since Mr. Fraser currently is

> a member of the Army National Guard, it its recommended that this request, after a determination is made, be returned to this Headquarters (Code RESP-3) for resolution concerning his dual status."). (emphasis added)

The petitioner was notified of the Board's decision, and it's approval by the Secretary of the Navy, in a letter dated January 26, 1981. By September, 1981, petitioner had received documentation demonstrating that he was again a Captain in the USMCR. He took these documents to HMA-773, the USMCR Attack Helicopter Squadron in Atlanta, and made application for membership in the squadron. (App.71) The Squadron Commander stated that the petitioner would be a welcome member, but that the paperwork had to be processed by higher authority, and that no one knew what to do to get the petitioner out of the Army Reserve and into the Marine Reserve.

Many phone calls and additional correspondence ensued. Headquarters Marine Corps and the Marine Reserve Support Center in Kansas City continued to state that they would take care of it. Nothing was done. More calls were made, HMA-773 became tired of dealing with it, personnel changed, and the process continued. One clerk at the Reserve Support Center confided that she didn't think anyone knew what to do and that it would probably take Court action.

In the meanwhile administrative actions were occuring. Petitioner was put on the Active Status List (ASL) of the USMCR (7/81), removed from the ASL for failure to participate (3/83) (although the application to HMA-773 had been ongoing for about 18 months), He was considered and rejected in '83 for promotion to Major (without any

performance records or any explanation of their absence), and he was discharged in 1987 (without notice of the discharge Disposition Board or opportunity to contest or comment, and after the institution of this suit in the Claims Court).

Petitioner filed a complaint with the Claims Court on January 20, 1987 invoking jurisdiction under 28 U.S.C. 1491. Defendant moved for dismissal on jurisdictional and statute of limitations bases. On May 9, 1988 the Claims Court issued an order denying dismissal and directing the Defendant to serve a response. (App. 14)

The Government, on June 8, 1988, renewed it's motion to dismiss, or in the alternative, a motion for summary judgment, and petitioner responded with a cross motion for summary judgment on September 4, 1988.

On April 3, 1989, the Claims Court ordered dismissal of all petitioner/plaintiff's claims except for an additional increment of longevity pay resulting from the constructive inactive service indicated by the reinstatement. (App. 22) This increment to be added to pay received for Army Reserve and Army National Guard duty performed between 1976 and 1988. Parties were ordered to file briefs regarding this longevity pay. The petitioner/plaintiff moved for reconsideration of the Court's order on May 12, 1989 and the Government responded on August 10, 1989, together with a proposed accounting of the pay due the plaintiff as a result of the increased longevity. The Court denied the motion for reconsideration by an August 17, 1989 order (App. 55), and on September 14, 1989 ordered a plan

for final resolution of the amount of the longevity pay due. (App.63)

The parties filed status reports on October 12 (plaintiff) and October 16 (defendant) of 1989. The plaintiff agreed not to contest the defendant's accounting of moneys due, gave notice of appeal, and stated the ancillary issues which remained unresolved: 1. reconciliation of retirement points between the Army and the Marine Corps for the time while he was a member of both services,

2. a claim for invalidation of the removal of the plaintiff from the USMCR Active Status List for inactivity while he was actively attempting to participate with HMA-773, 3. the issue of plaintiff had a legal right to participate with HMA-773 (or, somehow, participate in the Marine Corps Reserves) as he was attempting to do while in the dual status,

4. a claim for invalidation of the 1987 discharge from the USMCR without notice and while the Court action was in progress, 5. a claim for invalidation of the 1982 Promotion Board proceeding where there were no document in the record upon which to make a selection judgment nor any explanation of their absence, 6. a claim of right to be heard on the contentions of due process violations in the Corrections Board and in the 1971 Disposition Board proceedings, as the evidence to substantiate these claims was not apparent on the record and would require discovery, maybe trial, to prove.

The Claims Court ordered, on October 24, 1989 that final judgment be entered for $1,484.65 (the agreed longevity pay amount) and that plaintiff had established entitlement to no other claims. (App.66) This decision was

reflected in an October 25, 1989 Judgment. (App. 68)

Plaintiff/petitioner provided notice of appeal to the United States Court of Appeals for the Federal Circuit on December 12,1989 and filed an appellant's informal brief on January 1, 1990. The Government filed an appellee's informal brief on February 7, 1990 to which petitioner replied by letter to the Clerk on February 17th.

The United States Court of Appeals for the Federal Circuit issued an opinion on July 24, 1990. (App. 69) This opinion affirmed, "on the basis of the Claims Court's opinion" and a Judgment was entered the same day. (App. 70)

REASONS FOR GRANTING THE WRIT

Petitioner now respectfully comes to this Court to attempt to demonstrate: A. that there are important and fundamental rights embodied in the relationship between a military Reservist and his Country which warrant strong legal protection, and B. that there has been a failure of the systems established for the protection of these rights which warrants intervention by this Court for the clarification and preservation of the unique and significant relationship between military Reservists and their country.*

*This great nation does not wish to treat the personnel of its armed services with dishonor and indifference, and the law will not permit it. Skinner v. United States, 219 Ct. Cl. 322, 331. (1979)

I.

The right of Military Reservists to participate in the Reserves is fundamental to the accomplishment of National Objectives and to the welfare of all Reservists

The purpose of the military Reserves, as stated in 10 U.S.C. 262, is to provide trained units and qualified persons for war, national emergency, and other national security requirements. The obligation of the individual inactive Reservist to this plan was made clear by then District Judge Sirica when he wrote: "The reservist on inactive duty, on the other hand, is in a status of relatively reduced military responsibility. But he has an obligation to maintain himself in a state of readiness for full-time military duty", Olenick v. Brucker, 173 F.Sup. 493, 496 (1959)

This obligation on the part of the Reservist implicitly demands, a

return obligation on the part of the Military to provide an opportunity for the Reservist to fulfill his duty. The Military has addressed this by providing monthly training drills for Reserve Unit members, active duty for training (ADT) opportunities (usually on an annual basis for 2-4 weeks), "points-only" drill projects where the individual has the opportunity to do various things toward maintaining readiness and acquiring retirement points, though not in a paid status, and military correspondence courses which provide instruction on topics pertinent to readiness training.

Having provided these mechanisms for readiness training doesn't accomplish the the national objectives, however, if the Reservists aren't made aware of them. Many, maybe most Military personnel being discharged into the Reserves from active duty are only aware

of Active Reserve Unit drill mechanisms for participation in the Reserves. If they don't soon join an Active Unit, and if no one makes them aware of the other possibilities, they may never fulfill their obligation (they may never even become aware of them). The next question, therefor, is: what is the extent of the obligation of the Military Reserves to make its members aware of their readiness responsibility and their option for fulfilling them?

This question is addressed by 10 U.S.C. 278. which states: "The Secretary of Defense shall require the complete and current dissemination, to all Reserves and to the public, of information of interest to the Reserve components. The intent of this statute, with respect to the questions under examination here, is clarified by the legislative history of the Armed Services Reserve act of

1952, from which section 278 came. Senate Report No. 1795, reported in 1952 U.S. Cong. and Ad. News 2005, 2045 states:

> "This section requires the dissemination of information to members of the reserve components and to the general public, since it is essential that all interested persons be informed of their obligations and the manner in which obligations may be fulfilled."

Precisely what the denomination or the magnitude of the right that this invests in an individual Reservist, petitioner will not presume to advise this court. He has been unable to find it specifically defined. It is, however, a right that is implicitly of great importance, to the public interest as well as to any given Reservist.

One of the reasons that this right is so important to the public is that many of the the motivations that prompt a military man to remain in the Reserves,

once he has fulfilled his commitment, are abstract, and hard to explain. They are wound up with concepts of duty, service, and patriotism. These important motivations are, however, also tangled in perceptions of fair play and anticipations associated with more tangible things.

The tangible benefits of fulfilling his readiness obligations are easily identified, even if the degree of motivation they produce is not. They are the only things for which the Military has clearly provided a real or implied promise of delivery in return for his dutiful service. The expectation of these tangibles is, as mentioned, snarled back into the incentive of the intangible motivators, as well as providing their own inducement to continue service.

If the Reservist knows, or believes, that the Government has no obligation

to provide him a reasonable opportunity to satisfy his reserve commitment, and, concomitantly, to receive the material benefits of doing so, his entire motivational orientation will, almost certainly change. The effects this could have on the Reserves and the satisfaction of their National purpose is very great.

This brings us to the situation of the petitioner. From September of 1969 to November of 1971 he was actively attempting to discover a means of participation in his Reserve organization. He didn't know precisely what his obligations were, but he attempted to find out by asking the organization to which he owed them. The Marine Corps failed in their duty to inform him of his obligations and how to fulfill them. They erroneously told him there was no way. This failure was the default

of obligation from which all the other lamentable things that have occurred over the past twenty-odd years arose.

The petitioner had a duty to maintain readiness and the Marine Corps had a duty to inform him how to accomplish this. He made a reasonable effort to satisfy his duty and they flatly failed in theirs. The Corrections Board action of reinstating him into the ISL did nothing to correct the USMCR error because it did not provide, constructively, the satisfaction of the readiness obligation he was attempting to fulfill. Petitioner now asks you to declare that his right to do his duty, and to recieve the benefits thereof, is a legally enforceable right.

Whatever you decide the magnitude and legal designation of a Resevist's right to participate in the Reserves to be, the petitioner was possessed

of it in 1971 and he was possessed of it againin 1981, after reinstatement by the Corrections Board. When he attempted to participated with an active unit in 1981, however, the Marine Corps would not permit him to do so. They would not take the steps necessary to remove him from the very dual status position about which they had noted to the Corrections Board a need for resolution. (App. 2, 17) In the Headquarters Marine Corps recommendation letter to the Board they wrote: "since Mr. Fraser is currently a member of the Army National Guard, it is recommended that this request, after a determination is made, be returned to this Headquarters...for resolution concerning his dual status."

In 1981,the petitioner made formal application to an active Reserve unit which was willing to take him in. (App.

71) He offered his resignation from the Army Reserve and the Army indicated that they would release him. The Marine Corps, however, did nothing. Meanwhile, they moved him back off the Active Status List because of inactivity in 1983, and they rejected him for promotion in 1982 on the basis of a record that showed fifteen solid years of inactivity. Then in 1987 they discharged him without providing him notice of the discharge disposition Board, and while this suit was underway.

The Claims Court has found no 1968-1971 military readiness participation right, of a nature which the Corrections Board was legally bound to protect, nor any 1981-1987 right which the Claims Court must protect. The Federal Circuit agrees. If Reservists have the legally protected right to do what they are duty bound to do, therefor, this court

must so declare.

Regarding jurisdiction of the Claims Court: There has been much to do with regard to the jurisdiction of this case in the Claims Court, particularly with respect to the necessity of a statute authorizing compensation, as spelled out in United States v. Testan, 424 U.S. 392 (1976). Petitioner believes Testan is misapplied here, as it dealt with a situation where there was a claim for compensation for work performed at a higher pay grade level than the grade held by the worker, while here the petitioner was prevented from doing work he had an right and a duty to perform within the position he held.

The petitioner asserts that the Corrections Board had a legal duty, imposed by 10 U.S.C. 1552, to protect the petitioner's rights and the Claims Court has a duty, through their review

authority, Armstrong v. United States, 205 Ct. Cl. 754, 761 (1976); citing Herzog v. United States, 167 Ct. Cl. 337, 383-384 (1964); and cases cited therein, to assure that the Board fulfills its statutory mandate. The Claims Court also has authority to provide equitable relieve authorized by the Public Law 92-415, 86 Stat. 651, amendment to the Tucker Act, U.S.C. 1491, and to fashion a complete remedy where appropriate, Yee v. United States, 206 Ct. Cl. 388, 398 (1975). The Claims Court also has the ancillary jurisdiction and remand authority of 10 U.S.C. 1491 (2) for cases within its jurisdiction (here, jurisdiction over the additional increment of longevity pay is not disputed).

The keystone of the entire controversy, however, is the degree of legal protection that a Reservist's right to perform his duty is due. If

the right to perform Reserve obligations is a right that the Corrections Boards are bound to protect, failure to do so must amount to action contrary to law.

Petitioner urges the court, for the far reaching public policy and national security reasons outlined above, to find that a military Reservist's right to fulfill his military readiness obligations is protected by the due process clause of the Fifth Amendment.

II.

Judicial efficiency and fundamental fairness dictate that all important issues must be resolved or remanded, rather than dismissed, particularly when loss of ancillary jurisdiction may preclude future litigation

Upon dismissal of the fundamental claim for relief, from the effects of the petitioner's being denied participation

in the Reserves in the 1968-1971 period, other important issues arise which must be dealt with:

1. The petitioner, as discussed in reason I., as a member of the Active Status List of the USMCR had some degree of right to participate in the Reserves and to fulfill his Reserve membership duties. He made application for membership in an Active Reserve Unit that was willing to take him in (App. 71), he demonstrated a willingness to leave the Army Reserve, and the Army indicated they would not attempt to hold him. Headquarters Marine Corps, however, although indicating, to the Corrections Board, the necessity of their taking action on this matter, stood by and did nothing.

The Government, and the Claims Court, believe that the petitioner did not shoulder enough responsibility for the resolution of the dual status situation

and they point to a letter that originated in the Corrections Board that indicates that the petitioner had been advised that it was illegal to be a member of two services, and indicating that this warning was a part of what was considered by the Board when they placed petitioner in that very status. What they seem unable to believe is that the illegality advice came from Headquarters USMC (HQMC) and originated before the petitioner ever came to the Corrections Board. (App. 26, 61) The HQMC letter advising the petitioner about dual status illegality was with regard to a reappointment application completly unrelated to the situation following the Board action or to anything the board was considering except the petitioners past efforts to reaffiliate with the USMCR. (App. 73) Mistakes of time and relevency are understandable, but what is unfathomable

is how the petitioner's being advised of dual status illegality becomes a rationale for the belief that his being so advised is a reason that the Board (Secretary of the Navy) placed him in that position, or for the view that he didn't do enough to extradite himself from that status when the Marine Corps placed him in it.

Anyway, the rights and benefits of the petitioner during his 1981-1987 dual-status period need to be resolved. The Claims Court has decided that, even if it was mistaken about the facts, the petitioner can still not point to a statute authorizing money relief and the claim is, properly dismissed. (APP. 46)

The petitioner's claims, related to this period, are: 1. A reconciliation of the retirement points petitioner received for being on the USMCR Active

Status List with the retirement points he received from the Army Reserve for this period. (Petitioner fully fulfilled his readiness obligations to the Army--and has done so every year since 1976 but addition of the USMC retirement points will make a quantitative difference in the ultimate retirement authorization);

2. Invalidation of the petitioner's removal from the ASL for inactivity when he was actively attempting to participate and being prevented from doing so by the failure of the USMCR to do their duty to advise and support him. (this would result in an additional 15 retirement points per year to be reconciled with #1 -- 50 point per year are require for a qualifying year, 20 qualifying years are required for a deferred retirement at age 60, and each 365 points produce 2.5% of base pay as a retirement benefit) 3. Invalidation

of the 1987 discharge which resulted without notice to petitioner and while this suit was in progress. (In combination with #'s 1 - 3, this results in 45 - 60 more retirement points and completes the 20 qualifying years) 4. Invalidation of the 1982 promotion Board which made their non-selection judgment base upon a record showing 16 years of total inactivity. The law requires a record that is substantially complete and fair. Sanders v. United States, 219 Ct. Cl. 285, 302 (1979) (This, if selection is accomplished, increases the base pay for retirement computations) (see App. 67). 5 To be permitted discovery and trial on the contention that the Corrections Board results are invalid because of serious due process shortcomings. These shortcomings include the apparent subjugation of the independent judgment of the Board to the will of

the Military Services, as evidenced by the Board's initial dismissal of petitioner's application upon belief that Headquarters Marine Corps wished no favorable recommendation. Allegations of due process violations were made in the original complaint, and were encompassed in contentions of illegality of Corrections Board action in almost every paper filed by the petitioner since then, even though most of the discussion of the illegality argument was devoted to the failure of the Board to fulfill their statutory mandate to provide corrective action. Again, discovery and trial are necessary to prove these contentions.

The interest of Judicial efficiency dictates that all claims arising from a common core of facts should be adjudicated in one action. The interest of fairness demands that they be resolved

in this action, as the retirement benefit claims may not mature into another actionable complaint for another ten years (petitioner's eligibility for the deferred retirement). The above issues, requiring production and appraisal of evidence, are genuine issues of material fact and they simply should not have been disposed of by summary judgment. The petitioner beseeches you to find that this warrants reversal.

III.

The standards of the half-a-loaf doctrine in the Claims Court are too broad to be consistent

The "half-a-loaf" or "half-a-legal-loaf" doctrine is discussed in Sanders v. United States, 19 Ct. Cl. 285 (1979); Debow v. United States, 193 Ct. Cl. 499 (1970); Hankins v. United States, 183 Ct. Cl. 34 (1968); among others. It is a doctrine that provides that,

where an Administrative Tribunal has recognized error or injustice but failed to grant the full measure of appropriate relief requested by the aggrieved person, the Court will step in and complete the remedy, and a new cause of action is created.

In this case, the Claims Court deemed the doctrine inapplicable, Collins v. United States, 14 Cl. Ct. 746, aff'd, 865 F.2d 269 (Fed. Cir. 1988), having emphasized that the key to this doctrine in the failure to grant "appropriate monetary relief." (emphasis by the Court). (App. f.n. 49-50)

The problem with a naked "appropriateness" standard is that it is too broad to be a standard at all. It needs more definition. The petitioner believes that a reasoned attempt to place an aggrieved person in the position he would have been had the error or

injustice not occurred is appropriate. (App. 15) He premised each of his claims on that rational and it is likely that most claimants do the same. What is clearly not appropriate is Correction Board action that not only stops short of the relief requested but provides no reasoned analyses of why the non-granted requests were not "appropriate" to the error or injustice being corrected.

Please remember that <u>this is not an erroneous discharge case!</u> This a case where the petitioner was attempting to do his duty and was prevented from doing so. One of the consequences of the failure of the Marine Corps to fulfill their obligation to advise the petitioner of his Reserve obligations and his options for satisfying them was an improper discharge, but it was only one of the consequences and if the petitioner's claims for ameliorating them are to

be "appropriate" there must be some standard by which to fashion them. Here the Board (and the Court) simply declared that, since the petitioner had not actually performed duty in the capacity he was being returned to, and since the status of that reinstatement was ILS, there was no basis for awarding lost pay, promotion, or retirement points. (App. 7-9, 41-42, 59)

The non-performance of duties is meaningless in this circumstance. Of course the duties were not performed! The petitioner tried to, though. This is why the Board has the authority to provide "constructive" service.

> When the Corrections Board has determined the nature of the error or injustice, they fashion a fitting relief by changing the record so as to constructively reflect new facts and provide new entitlements appropriate to the relief. The Board corrects the record so as to undo that which has been done or to what should have been done and, as a result of the Board's

action, the individual whose records have been corrected becomes entitled to pay or benefits which would have been due him if error or injustice had not occurred,..." See: G-LGL Memo, 3 Oct 79. CoGuard Law Bulletin, June 1980.

The purpose of this discussion is to demonstrate that Corrections Boards have a strong mechanism for providing "appropriate" relief. The Court then has a strong doctrine, in the half-a-loaf doctrine, for ensuring that "appropriate" relief has in fact been provided. If the application of the half-a-loaf doctrine to the Court's review of the Board's action is to be meaningful, however, there must be some standards provided for the determination of what is "appropriate" in the context of this doctrine. To be placed in the position one would be absent the error or injustice is a well worn standard and it is capable of being both flexable and rationally determinable. It should

serve well here.

Corrections Boards have a moral sanction to determine, insofar as possible, the true nature of the error and injustice and to grant full and fitting relief. Duhon v. United States, 198 Ct. Cl. 564 (1972); and they have a Congressional mandate to determine the true nature, the effects, and the ramifications of an alleged injustice and to fashion a fitting relief. Yee v. United States, 210 Ct. Cl. 752, (1975). The legal configuration of this sanction/mandate, however is often obscure when overlain with the arbitrary and capricious standard. In this case for, for instance, the petitioner believes it to be incomprehensible that the board action, which resulted in no objective remedial effect, should be regarded as satisfaction of the above sanction/mandate. The Claims Court, however, believes that

the Board action was not arbitrary and that the sanction/mandate was satified, largely because the Court feels the Board understood the true nature of the error or injustice and that the petitioner had not cited a statute, regulation, or procedure entitling him to relief. (App. 36, 38, 49-50, 57-60)

There are two rational interpretations one can reach regarding the half-a-loaf doctrine, base upon the information available in this case: A. That "appropriate" is determined by whether or not the Board action is arbitrary and capricious, (see footnote App. 49-50), or B. that the full range of the claimants legal claims are "appropriate" if the Board grants him any of them. The case relied upon by the Claims Court here is Collins v. Untited States, 14 Cl. Ct. 746, aff'd, 865 F.2d 269 (Fed. Cir. 1988). On page 754,quoting Denton

v. United States, 204 Ct. Cl. 188 (1974), is stated "once an administrative body decides relief is proper on the claim and representation then made, it should not be free to illegally or arbitrarily award less relief than that requested by the claimant..."

Looking elsewhere: "Where a Corrections Board in its discression grants favorable relief to an applicant, it may not stop short of granting full relief to the applicant..." Homcy v. United States, 210 Ct. Cl. 332 (1976).

It appears that the Claims Court is, in the same operation, applying the arbitrary and capricious standard to the half-a-loaf doctrine and to the the sanction/mandate that a Board has to formulate fitting relief. The result is an obscuration of all three principles.

There are also matters of permissive/mandatory prior administrative

hearings (e.g. App. 32, 49) and distinctions between applications of the new cause of action portion of the doctrine versus application of the incomplete remedy portion of the doctrine.

If the half-a-loaf doctrine is to have utility it must be identifiable and capable of application by it's own Clear standards. The standard of "appropriate" simply must have more definition. The doctrine is in place. It has the potential to help guide claimants, Boards, and Courts alike. That can't happen, however, unless it becomes capable of application upon identifiable criterion that clearly delineate the doctrine.

The legal community needs your guidance.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

D. Larry Fraser
10850 SW 112 Ave.
Miami, FL 33176
(305) 595-5533
Pro se

November 21, 1990

DEPARTMENT OF THE NAVY
HEADQUARTERS OF U.S. MARINE CORPS
WASHINGTON, D.C. 20380

1 JUN 1979

Mr. David L. Fraser
Stouffer Place, 26-8
Lawrence, Kansas 66044

Dear Mr. Fraser:

At the request of Mr. Alves, I am forwarding to you a DD Form 149, a set of instructions for petitioning the Board for Correction of Naval Records, and a copy of the procedures of the Board for Correction of Naval Records. Mr. Alves indicated that you desired these materials in order to submit an application for relief concerning your discharge from the Marine Corps Reserve and your subsequent efforts to obtain a reappointment in the Marine Corps Reserve.

Since the Board cannot reinstate any person into the naval service, it appears that your request should be for the following:

1. Reappointment in the Marine Corps Reserve

in such a manner as to allow your retention of your current status in the Army National Guard until such time as you are actually reappointed in the U.S. Marine Corps Reserve;

2. Correction of your records to show that the discharge from the Marine Corps Reserve in your case was erroneous;

3. Correction of your record to show that your prior USMCR service, your employment in the aviation field in Southeast Asia, and your service in the Army National Guard are all creditable service; and

4. Specific directions to Headquarters, U.S. Marine Corps that upon reappointment as a Captain in the U.S. Marine Corps Reserve, you are to be considered by the next selection board convened as an officer being considered for selection to the grade of major for the first time.

I trust that the foregoing information has

proven helpful.

Sincerely,

James E. L. Seay
Captain, U.S. Marine Corps
Judge Advocate

Enclosures

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370

21 NOV 1980

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: ex-Capt. David L. FRASER, 516-44-8700/089627, USMCR; Review of naval record

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachment
(2) Case Summary
(3) Officer Qualification Record
(4) Comment of CMC

1. Pursuant to the provisions of reference (a), Petitioner, a former member of the United States Marine Corps Reserve filed enclosure (1) with this Board, requesting that his naval record be corrected to show he was not discharged on 16 November 1977.

2. The Board reviewed Petitioner's allegations of error and injustice on 9 July 1980 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the

available evidence of record. Documentary material considered by the Board considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Prior to filing his application with this Board, Petitioner exhausted all administrative remedies afforded him under existing law and regulations within the Department of the Navy.

b. Enclosure (2) is a case summary which sets forth some of the more significant facts and circumstances of Petitioner's military and civilian record. Additionally, the Board in its deliberations considered Petitioner's application, enclosure (1), together with all material submitted in support thereof, naval records, and

applicable statutes, regulations and policies.

c. Petitioner entered the U.S. Marine Corps on 17 August 1960 and was commissioned a Second Lieutenant on 12 May 1964. Having successfully completed both flight and helicopter training, Petitioner was designated a naval aviator. He served in Vietnam from 31 August 1965 to 14 September 1966 and was awarded a Purple Heart for wounds received in action. Upon his return from the Republic of Vietnam, Petitioner was assigned duties as a flight instructor. However, upon the death of his father, Petitioner requested a hardship discharge. On 8 September 1967 he was allowed to resign his commission in the U.S. Marine Corps to accept appointment in the U.S. Marine Corps Reserve. Petitioner was then transferred from the Standby Reserve (Class III) to the inactive status list on 12 September 1968. Following the

resolution of his father's estate Petitioner returned to South East Asia as a pilot for Air America. He contacted the Marine Corps Reserve headquarters in Kansas City and inquired as to the procedures for maintaining his affiliation with the Marine Corps. He was told there was no method by which he could participate in reserve while outside the United States. On 16 November 1971 Petitioner was referred to a dispostion board and was discharged for inactivity.

d. The comments of the Commandant of the Marine Corps have been solicited in this matter. In the process of examining the record the Commandant has determined that Petitioner was not properly advised of his status or impending separation by the Commanding Officer Class III Forces, U.S. Marine Corps Reserve. Accordingly the Commandant was of the opinion that the Petitioner should be tendered a reserve

commission and his discharge cancelled (see enclosure 4).

e. The Board, mindful of the long standing limitation on its authority to order the reinstatement, is in accord with the opinion of the Commandant that Petitioner's discharge was not proper under the then existing procedures. However, it defers any opinion as to the appropriate relief. In this regard as a collateral matter it recommends that the Secretary take action with regard to the recommendation of the Commandant of the Marine Corps and that the record be returned to the Commandant upon action by the Secretary.

f. As to the remainder of the Petitioner's requests, the Board found that it was without power to direct any promotion. It further found that since Petitioner had not in fact participated in any reserve activities, no basis exists to award retirement points for any of the

years during which he held no reserve status. Accordingly it recommends that those requests be denied.

CONCLUSION:

Upon Review and consideration of all the evidence of record the Board now finds the existence of an injustice warranting corrective action the Board's finding in this regard is based upon Petitioner's overall record and particularly the fact that he was never made aware of either his Reserve obligations or options available for fulfilling those obligations, despite his attempts to discover them.

RECOMMENDATION:

A. In view of the foregoing the Board recommends as a matter collateral to the instant petition that the Secretary of the Navy take action to tender a commission in the United States Marine Corps Reserve in the grade of Captain to the Petitioner.

B. For the reasons set forth in paragraph 3f above it recommends that the remainder of the Petitioner's requests be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board proceedings in the above-entitled matter.

ROBERT D. ZSALMAN
Recorder

JAMES S. RICHARDSON,SR.
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

SAMUEL SCHULMAN
13 Jan 1981

Reviewed and approved:

By copy of this endorsement the Commandant of the Marine Corps is authorized to reinstate David L. Fraser SS No. 516-44-8700 in the U.S. Marine Corps Reserve as though he had never been discharged and that his discharged of 16 November 1971 be cancelled.

(signed)
J. A. (unable to read)
Assistant Secretary of the Navy
(Manpower, Reserve Affairs
& Logistics)

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON D.C.

1:JR:ka
2384-79
26 January 1981

FROM: Chairman, Board for Correction of Naval Records

TO: Commandant of the Marine Corps

SUBJ: Ex-Capt. David L. FRASER, 516-44-8700/089627, USMCR; Review of naval record

REF: (a) 10 U.S.C. 1552

ENCL: (1) Approved findings, conclusions and recommendations of BCNR, less enclosures
(2) Copy of BCNR ltr to subject this date

1. In accordance with reference (a), the Board for Correction of Naval Records has reviewed allegations of error and injustice and the naval record of the subject.

2. The Secretary of the Navy has reviewed the proceedings and approved the recommendation of the Board as contained in enclosure (1).

3. The regulations approved by the Secretary of the Navy require that the naval record of subject be changed, where appropriate, in accordance with the final decision.

4. The Board has advised subject of the final decision.

5. It is requested that this letter and enclosures be placed in the subject's official record and that this Board be furnished a copy of any correspondence relating to this decision.

6. It is requested that the Veterans Administration be advised, upon request, that subject's application was received on 14 June 1979.

JAMES S. RICHARDSON, SR.
By direction

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
WASHINGTON, D.C. 20380

In reply refer to
MMSR-3-ned
16 MAR 1981

Mr. David L. Fraser
263 Sharney Place
Kennesaw, Georgia 30144

Dear Mr. Fraser:

In accordance with the decision of the Secretary of the Navy, your records have been corrected.

You have been reinstated in the United States Marine Corps Reserve as though you had never been discharged. Your discharge of 16 November 1971 is cancelled.

Please return your discharge documents to this headquarters (Code MMSR-3).

Sincerely,

R.L. SONGER
Captain, U.S. Marine Corps
Head, Separation Section
Separation and Retirement Branch
Personnel Management Division

IN THE UNITED STATES CLAIMS COURT

No. 25-87C

(Filed May 9, 1988)

DAVID LARRY FRASER

v.

THE UNITED STATES

ORDER

Plaintiff entered the United States Marine Corps (USMC) on August 17, 1960. He was commissioned a second lieutenant on May 12, 1964 and served in Viet Nam until 1966. On September 8, 1967, he was allowed to resign his commission in the USMC and to accept appointment in the USMC Reserve. Subsequently, on September 12, 1968, plaintiff was transferred from the Standby Reserve (Class III) to the inactive status list. Following resolution of some personal business, plaintiff returned to Southeast Asia as a pilot for Air America. Pursuant to his inquires, the USMC Reserve

informed him that he could not participate in the Reserve while he was located outside the United States. Subsequently, on November 16, 1971, a disposition board discharged plaintiff from the Reserve for inactivity. In 1976 plaintiff became a member of the U.S. Army Reserves.

In 1979, plaintiff requested that the Board for Correction of Naval Records (Board) review his discharge and that, in essence, "he be placed in the position he would have been in" if he had participated in the Reserve since the date of his discharge in 1971. The Board found that corrective action was warranted based upon the plaintiff's overall record and "particularly the fact that he was never made aware of either his Reserve obligations or options available for fulfilling those obligations, despite his attempts to discover them." The Board recommended that action be taken to tender

a commission in the USMC Reserve in the grade of captain to plaintiff and denied his requests for promotion and for award of retirement points for years he held no Reserve status. According to plaintiff, the Board did not specifically address his request for compensation for loss of pecuniary benefits. On January 13, 1981, the Office of the Secretary of the Navy reviewed and approved the Board's recommendation and authorized the Commandant of the Marine Corps to reinstate plaintiff in the USMC Reserve "as though he had never been discharged" and "that his discharge of 16 November 1971 be cancelled." By letter of January 26, 1981, plaintiff was informed that "the Commandant of the Marine Corps will take the necessary action to issue a new discharge certificate" and that "the Marine Corps Finance Center * * * is authorized to pay all monies

lawfully found to be due as a result of this decision. Any questions concerning the amount computed to be done should be addressed to that Finance Center." It was also suggested in that letter that plaintiff contact the nearest Veterans Administration Office since he might now be eligible to receive veteran's benefits.

According to plaintiff, since 1981 when the Board and the Secretary of the Navy authorized his commission, he has tried to begin participation in the USMC Reserve. However, he has been a member of the U.S. Army Reserve since 1976. The Navy has been on notice since, at least, December 1979 that a decision to tender plaintiff a commission in the USMC Reserve and cancel his 1971 discharge would result in his having commissions both in the Army and the Navy or "dual status," a matter which would have to be resolved before plaintiff could be

allowed to participate in the USMC Reserve. Failure to resolve this "dual status" matter appears to be part of plaintiff's claim before this court that he has been denied full relief from his improper discharge by the Board and the Secretary of the Navy which he claims would flow from the Board's authorization to reinstate him in the USMC Reserve and cancel the 1971 discharge.

Defendant, rather than filing an answer to plaintiff's complaint, moved for dismissal on the grounds that the Claims Court did not have jurisdiction over the claim pursuant to the Tucker Act, 28 U.S.C. § 1491, and that the statute of limitations bars this action. See 28 U.S.C. §2501.

After careful review of the filings in the record, it is determined that additional analysis is necessary to resolve matters reasonably raised by the

pro se complaint and defendant's motion. In particular, the record does not provide information whether plaintiff, during any relevant period, would be entitled to retirement pay stemming from his military service, i.e., whether he is of the appropriate age and has the requisite years of service, actual or constructive. In addition, plaintiff has apparently been voluntarily serving in the U.S. Army Reserve since 1976. The Board's/Secretary's apparent decision to cancel his Marine Corps discharge so as to reflect continuous service by plaintiff in the USMC Reserve from 1971, which is somewhat unclear from the present record, may raise a question regarding the legality of the Board's/Secretary's decision. Whether a person may be placed in a position where he is serving under two commissions needs further review as to legal authority. See Bridgman v. United States, 185 Ct. Cl. 133, 139, 399

F.2d 186, 190 (1968). Also unclear from the record is whether the USMC Reserve has taken any steps to resolve plaintiff's "dual status" and, if so, where the matter now stands in relation to implementing the Board's 1981 authorization. If any Board/Secretary relief extends only to plaintiff's entry into the Army Reserve, this could have relevance with respect to the application of 28 U.S.C. § 2501.

Thus, since this matter presents a somewhat unusual situation concerning the possible monetary impact of a favorable Correction Board/Secretary decision, and questions in this respect exist which cannot be resolved on the filings to date, it is ORDERED:

(1) Defendant's motion to dismiss the complaint is denied without prejudice;

(2) Defendant will have 30 days from the date of this order to serve its

response to the complaint.

_____

James F. Merow
Judge

IN THE UNITED STATES CLAIMS COURT

NO. 25-87C

(Filed: April 3, 1989)

DAVID LARRY FRASER

V.

THE UNITED STATES

ORDER

This case is before the court on defendant's motion to dismiss the complaint for lack of jurisdiction or, in the alternative, motion for summary judgment. Plaintiff has cross-moved for summary judgment. Plaintiff seeks retroactive promotion, back pay and award of retirement points.

Plaintiff, who entered the United States Marine Corps (USMC) on August 17, 1960, was allowed to resign his regular commission on September 8, 1967, due to personal hardship, to accept appointment in the USMC Reserve (USMCR). At the time of his resignation, plaintiff held the

rank of Captain. On September 12, 1968, plaintiff was transferred from the Standby Reserve active status list (ASL) to the inactive status list (ISL). Following resolution of personal business, plaintiff relocated to Southeast Asia as a pilot for Air America. Pursuant to his inquiries, he was notified that he could not participate in the Reserve while he was located outside the United States. Thereafter, a Disposition Board recommended Captain Fraser be involuntarily discharged from the Reserve because he had been a member of the ISL in excess of three years. In response to this recommendation, plaintiff requested that he be retained on the ISL of the Marine Corps Reserve, indicating that he wished to qualify for retention in any way possible. Captain Fraser was honorably discharged from the Reserve on November 16, 1971. Subsequently, plaintiff became affiliated

with the Army National Guard in January 1976.

On June 10, 1979, Plaintiff petitioned the Board for Correction of Naval Records (Board) requesting a correction of his records to invalidate his 1971 discharge, to be reinstated in the Reserve as though he had never been discharged, to preserve his status of rank as if he had fully and satisfactorily participated in the Selected Marine Corps Reserve (SMCR), and to be compensated for loss of applicable pecuniary benefits. The Board found the existence of an injustice warranting corrective action, basing its decision on "[p]etitioner's overall record and particularly the fact that he was never made aware of either his Reserve obligations or options available for fulfilling those obligations, despite his attempts to discover them." The Board recommended that plaintiff be tendered a commission in the USMC Reserve in the

grade of Captain. On January 13, 1981, the Assistant Secretary of the Navy authorized the reinstatement of plaintiff in the USMC Reserve "as though he had never been discharged and that his discharge of 16 Nov 1971 be cancelled." Plaintiff was notified that he had been reinstated in the USMCR (ISL) on March 16, 1981. Thereafter, he was reinstated into the Individual Ready Reserve (ASL), effective July 6, 1981. He was given a new anniversary date of July 6, 1981, with eligibility for promotion after July 5, 1982.

With respect to Captain Fraser's other requests, the Board found that, as he had not in fact participated in any Reserve activities, there existed no basis for award of retirement points for the years during which he held no Reserve status. In addition, the Board

did not find it appropriate to grant his request for Marine Corps credit for his Army National Guard service since, after being informed that he could not simultaneously hold commissions in the Army National Guard and the Marine Corps Reserve, Captain Fraser failed to take appropriate action. The Board also noted that, if Captain Fraser had been reinstated as of November 16, 1971, his original discharge date, he would have become immediately eligible for consideration for promotion without the benefit of fitness reports or participation in the Marine Corps Reserve (MCR), which could only have resulted in his failure for selection. On August 2, 1982, Captain Fraser was considered, but not selected, for promotion to Major. He transferred from the ASL to the ISL of the Reserve, effective March 10, 1983. Subsequently, on July 13, 1987,

Captain Fraser was honorably discharged from the USMCR.

Plaintiff filed his complaint with this court on January 20, 1987. Defendant moved for dismissal on the grounds that the court did not have jurisdiction over the claim pursuant to the Tucker Act, 28 U.S.C. § 1491, and that the statute of limitations, 28 U.S.C. § 2501, bars this action. In the alternative, defendant moved for summary judgment. As mentioned, plaintiff cross-moved for summary judgment.

Plaintiff claims that he is owed back pay for drills and active duty which he could have performed during the period from September 1967 to the present, but was erroneously prevented from performing by the USMCR. He claims payment is due him pursuant to 37 U.S.C. §§ 204, 205, 206 and 301a. In addition, plaintiff, who has received payments for drills and active duty performed in the U.S. Army

Reserve and the Army National Guard between January 1976 and the present, is claiming entitlement to an additional increment (back pay) to these payments, based on increased longevity and higher rank that would have been included in the calculation of these payments had the Board corrected his records. He cites to 37 U.S.C. §§ 204, 205, 206 and 301(a) as authority for this claim. Plaintiff is also requesting military reserve retirement points for the years from the time of his discharge from active duty to the present.

With respect to the statute of limitations issue, plaintiff argues that when the Board granted him only partial relief, i.e., cancellation of his 1971 discharge but no promotion, back pay, or retirement points, a cause of action accrued under the "half-a-loaf" doctrine, with the date the plaintiff became aware

of the Board's decision the accrual date of his claim for purposes of determining when the time period for filing his claim began to run. In addition, he claims the running of the time period would be tolled by the intervening periods of plaintiff's active military duty. Furthermore, plaintiff argues that he has a "continuing claim" since he has been paid for his periods of active duty in the Army Reserve and/or Army National Guard every year between 1976 and the present. Plaintiff states that a claim accrues on each date a payment was made or should have been made which is different in amount than that claimed.

In response, defendant argues that the court lacks jurisdiction over the complaint because plaintiff did not allege that a particular statute, as opposed to general pay statutes or regulations, entitles him to relief. See United States

v. Testan, 424 U.S. 392 (1976). The government claims, as a Reserve Officer (ISL), no statute or regulation entitles plaintiff to the compensation he requests without his being ordered to active duty or training. According to the government, plaintiff's request for retroactive credit for duty he was not ordered to perform and, in fact, did not perform does not create a monetary entitlement so that jurisdiction would lie in this court. In addition, the government argues that plaintiff does not become entitled to the payment of money by the action of the Assistant Secretary of the Navy reinstating Captain Fraser to the same position he was in prior to his discharge since, as a member of the Reserve (ISL), he was not eligible for pay, promotion, or assignment to any mobilization position. In addition, members of the ISL are not permitted to participate in Reserve training or earn

Reserve Retirement credits. Only Reserve members assigned to the ASL are eligible for promotion and mobilization assignments.

In sum, according to defendant, plaintiff fails to allege that any statute or regulation entitles him to monetary compensation because he received inaccurate information regarding his participation in the Reserve, with the result that he was discharged for inactivity. According to defendant, although the basis of plaintiff's claim is that he was only granted partial relief by the Board, plaintiff has not shown the existence of a legal entitlement to the relief the Board denied. Consequently, in the absence of a legal entitlement to the requested relief, plaintiff has not stated a claim within the court's jurisdiction pursuant to 28 U.S.C. § 1491.

With respect to whether the statute of limitations bars this suit, the government

argues that, since this complaint was filed on January 20, 1987, plaintiff did not file his claim within 6 years of when he resigned his commission in the USMC in 1967 or of when he was involuntarily discharged in 1971 and, thus, 25 U.S.C. § 2501 bars any claim based on these actions, since claims for military pay and allowances accrue when the pay or allowance sought is withheld. According to the government, plaintiff's resort to the Board for correction of his records could not revive a time-barred claim or create a new cause of action based on the Board's action(s). Defendant argues that the "half-a-loaf" doctrine, on which plaintiff relies, has usually been applied only in cases in which it was mandatory to seek administrative relief prior to coming to this court, and resort to a Correction Board is not mandatory. In the alternative, the government argues that, even if plaintiff's

resort to the Board revived the time period for filing a complaint with this court, plaintiff's complaint is still untimely as the Assistant Secretary of the Navy approved the Board's decision to grant Captain Fraser relief on January 13, 1981, and this complaint was filed on January 20, 1987.

Since plaintiff raises his complaint pro se (although he has legal training), the matter has been considered in the light most favorable to plaintiff in determining whether he has stated a claim for which relief can be granted under any theory within the court's jurisdiction. See Haines v. Kerner, 404 U.S. 519, 520-21 (1971).

As mentioned, plaintiff, for personal reasons, voluntarily resigned his commission in the USMC in 1967. Thus, it is clear that plaintiff was not wrongfully discharged from active duty service in the USMC. He transferred to the USMC Reserve (ASL).

Thereafter, he was transferred to the ISL and subsequently was discharged because he had been ISL for over three years. The government claims plaintiff had remained on the ISL because he indicated he was unavailable for active duty participation in the Reserve. Plaintiff's response is that, although he inquired, he was not given adequate or accurate information regarding how he could participate in an active duty status while living overseas working for Air America.

The Board's decision to cancel his discharge was based upon plaintiff's "overall record and particularly the fact that he was never made aware of either his Reserve obligations or options available for fulfilling those obligations, despite his attempts to discover them." However, the Board denied plaintiff's other requests regarding promotion and retirement points, and his request for compensation for loss

of pecuniary benefits was not specifically addressed by the Board. Thus, plaintiff claims the Board's actions were arbitrary and capricious because, even though the Board recognized that his discharge was improper under the circumstances, the Board failed to grant him the total relief he requested. Consequently, plaintiff argues that, under the "half-a-loaf" theory of recovery, he has a cause of action.

The Board has discretion to take such action as necessary to correct an error or remove an injustice. 10 U.S.C. § 1552. The Claims Court has jurisdiction to review a decision of a Board for correction of military records having pay consequences. See Hertzog v. United States, 167 Ct. Cl. 377 (1964). Although the Court of Claims held in Kirby v. United States, 201 Ct. Cl. 527 (1973), cert. denied, 417 U.S. 919 (1974), that exhaustion of administrative remedies by resort to correction Board procedures is permissive,

if a plaintiff seeks relief from the Correction Board, "such plaintiff is bound by the Board's determination unless he can meet the difficult standard of proof that the Correction Board's decision was illegal because it was arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, or money is due." See Sanders v. United States, 219 Ct. Cl. 285, 298, 594 F.2d 804, 811 (1979).

Although plaintiff argues the Board acted illegally or arbitrarily in refusing to promote him or to award him back pay and retirement credit, he cites to no statute, regulation or procedure entitling him to such relief based on the Board's authorization of a correction of his records to reflect cancellation of his 1971 discharge. In Collins v. United States, 14 Cl. Ct.

746, aff'd, 865 F.2d 269 (Fed. Cir. 1988), a discharged Army officer was later reinstated upon a Correction Board's determination that his discharge had been improper, but he was not awarded back pay for the period in issue. The plaintiff in that case was in a nonpay status when discharged. The Board had ordered that that plaintiff be promoted, effective on a date which was during the period of his nonpay status. The court determined that the Board's actions in voiding Collins' discharge, and retroactively promoting him, did not result in any right under law or regulation to back pay since, during the relevant time period, Collins was in a nonpay status. Consequently, it was determined that the Board did not act arbitrarily, capriciously, or contrary to law in denying back pay to that plaintiff.

Similarly, in the present case, plaintiff was in a nonpay status, and had been on the ISL since 1968, when discharged in

1971. The Board authorized the correction of his records to reflect cancellation of his discharge and the plaintiff's reinstatement in the USMC Reserve to the same position he would have been in if he had not been discharged. Plaintiff does not argue that, upon his reinstatement, he was in an active duty status. In fact, he was officially reinstated to the ASL in July 1981, months after the Board's action to cancel his discharge, which demonstrates that plaintiff was reinstated into an inactive duty, nonpay status upon the Board's action and the Assistant Secretary of the Navy's approval thereof. Since plaintiff is not entitled per se to back pay for any period when he was in a nonpay status, the Board did not act arbitrarily, capriciously or contrary to law when it corrected plaintiff's military records to cancel his discharge yet denied his requests for compensation and for

retirement credit with respect to the time period between the date of his transfer from active duty pay status to the date of the Board's decision. Plaintiff's specific claims will now be addressed.

In particular, plaintiff argues that once the Board ordered his records corrected to reflect the cancellation of his 1971 discharge, his records should also reflect credit for constructive service from the date of his discharge to the date of the Board's decision, and that such service should be considered to have been successfully performed so that he would have merited promotion. Therefore, plaintiff argues he is entitled to back pay based on this retroactive promotion.

In Voge v. United States, 844 F.2d 776 (Fed. Cir. 1988), the court stated, at 782, regarding a request for retroactive promotion, "strong policy reasons compel courts 'to allow the widest possible latitude to the armed services in their

administration of personnel matters' * * * absent a statute or regulation entitling a service member to a promotion as a matter of law, the Claims Court has no authority to entertain this claim." Plaintiff cites to no statute or regulation entitling him to be granted retroactive promotion by this court. Since, as a matter of law, courts do not have the authority to direct the promotion of military personnel, this court cannot direct the retroactive promotion of plaintiff. Thus, plaintiff's claim for back pay based upon a failure to to promote is not allowed.

Plaintiff's back pay claim also includes a request for all compensation he would have received had he fully participated in the Reserve, i.e., at drills and training, from the time of his discharge from active duty to the present. The government's response is that plaintiff voluntarily transferred from active duty in the USMC

and subsequently, for various reasons, made himself unavailable for active duty participation in the Reserve. Defendant notes that plaintiff was in an inactive duty, nonpay status when discharged for inactivity in 1971, and plaintiff, upon cancellation of his discharge, was returned to the Reserve in an inactive duty, nonpay status,

until he was reinstated in the Reserve (ASL), which was effective July 6, 1981.

This part of plaintiff's claim for back pay based on constructive service, as a result of the Board's action in cancelling plaintiff's discharge, must fail because plaintiff's service would have to be considered as served while in an inactive duty, nonpay status (ISL). 1/

1/ According to the Marine Corps Reserve Administrative Management Manual (MCRAMM), reservists, while assigned to the ISL, are not eligible for pay or promotion, will not be assigned to any mobilization position and may not participate in Reserve training or earn Reserve retirement credits.

Moreover, pursuant to 37 U.S.C. § 206, a reservist is not entitled to compensation at the prescribed rate unless he/she is ordered to perform and does perform the work. Since plaintiff did not actually perform any drills, training, instruction or other appropriate duties during the time period in issue, he may not be compensated therefor. 2/

With respect to plaintiff's claim for retirement credit, he is requesting retirement points or credit for years of constructive service (active duty) which he did not serve. The Board determined

---

2/ Plaintiff claims that he should have been informed that he could have prevented his 1971 discharge for inactivity by taking correspondence courses while he was living and working in Southeast Asia. Under 37 U.S.C. § 206(d), compensation is not authorized for work or study performed by a reserve member in connection with correspondence courses of an armed force. Thus, even if plaintiff had performed correspondence course work, his nonpay status would not have been altered.

that plaintiff did not, in fact, participate in any activities for which reserve retirement credit could be awarded. Thus, the Board found there was nothing upon which to base an award of retirement credits for those years. In Kirby v. United States, 201 Ct. Cl. 527 (1973), the court held, at 536, that with respect to the retirement claim there in issue, "the plaintiff must allege that he [she] has received credit (actual or constructive) for 20 years of service before he [she] has stated a sufficient cause of action." In this case, plaintiff has done neither. Plaintiff has not alleged that he has actually served 20 years of service or that he has received constructive credit therefor. See 10 U.S.C. § 1331(a); MCRAMM ¶ 6000. The Board specifically did not grant plaintiff constructive credit towards his retirement requirements. Therefore, plaintiff has not stated a cause of action upon which he may be granted relief by this court

at this time. See, e.g., Jankovic v. United States, 204 Ct. Cl. 807 (1974).

In addition, plaintiff claims that, subsequent to the Board's correction of his records to cancel his discharge, and to reinstate plaintiff to his former position in the USMC Reserves, he was prevented from participation in the Reserve as a commissioned officer because he had continued his affiliation in the Army National guard/Reserve, which he had joined in 1976. Because his "dual status" position was not resolved by the USMC Reserve after the Board's action, plaintiff claims the effect of the Board's decision has been to prevent him from "enjoying present and future benefits of performing in the position to which the Board returned him * * *."

The government responds that plaintiff's reinstatement into the Reserve, by itself,

does not create an entitlement to pay. 3/ Since plaintiff has not established entitlement to perform and never performed reserve drills or active duty for training, he was not entitled to pay therefor.

As concluded with regard to plaintiff's back pay claim for work he did not perform, with respect to the years prior to the Board's decision, this claim has no merit. Under 37 U.S.C. § 206a, "a member of the

---

3/ The record indicates that plaintiff's USMC Reserve records have been corrected to reflect continuous service beginning in August 1960. Furthermore, plaintiff was considered but not selected for promotion to the rank of Major by the FY-83 Marine Corps Reserve Major Selection Board convened on August 2, 1982. These examples indicate that, although he remained affiliated with the Army National Guard/Reserve, his reinstatement into the USMC Reserve was given effect.

National Guard or a member of a reserve component or a uniformed service * * * is entitled to compensation * * * (1) for each regular period of instruction, or period of appropriate duty, at which the member is engaged." Plaintiff states directly that he did not perform drills or active duty for training, although, as mentioned, he claims the USMC Reserve is responsible for his lack of participation. However, plaintiff cites to no statute or regulation entitling him to this pay. See generally Panzarella v. United States, 214 Ct. Cl. 815, 816 (1977). ("[T]he mere possibility of earning * * * compensation does not amount to the current entitlement or right to pay which is the prerequisite to a successfully pleaded pay-and-reinstatement claim in this court.")

Plaintiff's final claim is for an additional increment to payments he has received for drills and active duty he

performed as a warrant officer in the Army National Guard and Army Reserve between January 1976 and the present. Plaintiff claims entitlement to this pay "arising from the increased longevity and higher rank that would have been included in the calculation of these payments had the errors and injustices * * * truly been corrected." As already mentioned, the Claims Court does not have the authority to retroactively promote plaintiff. Thus, that part of plaintiff's claim for money which arises from the higher rank which he claims should have been included in the calculations of these payments may not be further considered herein. However, plaintiff may have stated a cause of action, pursuant to 37 U.S.C. § 205, based on his claim for an additional increment to payments he has received for active duty in the Army National Guard/Reserve. In essence,

plaintiff is claiming that years of constructive service, based on the Board's actions, should be included in the computation of creditable service for purposes of computing his payments from the Army for active duty and drills. 4/ Since plaintiff claims he continues to be affiliated with the Army National Guard/Reserve and to perform yearly active duty and drills for which he receives payments which are less than what he should receive based on his total

---

4/ Plaintiff had also requested that the Board grant him Marine Corps credit for his Army National Guard/Reserve service. The Naval Correction Board found no relief was appropriate since plaintiff had failed to take appropriate action after being advised that he had to either resign his commission in the Army National Guard and request appointment in the USMC Reserve under a special program or request an interservice transfer in the grade of Chief Warrant Officer. Plaintiff did not pursue either option so the Board, "which relies on equity," denied this request. This request to the Board appears to be the opposite side of plaintiff's request to this court for additional pay for his active duty in the Army National Guard/Reserve based on constructive service in the USMC Reserve arising from the Board's decision to cancel plaintiff's 1971 discharge.

years of service, he may have stated a claim for back pay within the court's jurisdiction. However, since these payments are for active duty service and were made to plaintiff beginning in 1976 continuing to the present, the running of the 6 year statute of limitations period may bar any claim based on some of these payments, i.e., those payments which were not made, or due to be paid, within 6 years of the date the complaint was filed. 28 U.S.C. § 2501. 5/

5/ Defendant argues that plaintiff's other claims are barred by 28 U.S.C. § 2501, the 6 year jurisdictional statute of limitations. In general, claims for military pay and allowances accrue when the pay or allowance is withheld. See Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986). Plaintiff urges that his claims arose when the Correction Board declined to grant the full relief sought. Plaintiff bases his claim on the "half-a-loaf" doctrine. See Honey v. United States, 210 Ct. Cl. 332, 536 F.2d 360 (1976), cert. denied, 429 U.S. 984 (1976), wherein the court held, at 210 Ct. Cl. 338, "[f]ailure of the Board to grant full relief results in what the court has termed 'a new cause of action' or a 'continuing claim' which revives the limitations period." In Collins v. Unitead States, 14 Cl. Ct. 746, aff'd, 865 F.2d 269 (Fed. Cir. 1988), it was determined that the key to the "half-a-loaf" doctrine is that a (cont'd)

In this connection, plaintiff asserts his claim falls within the "continuing claim" doctrine. If a claim is a continuing claim, as delineated in Friedman v. United States, 159 Ct. Cl. 1 (1962), a plaintiff may be able to state a claim for that amount coming due within 6 years of when the complaint is filed. See also Carver v. United States, 159 Ct. Cl. 67, 74 (1962); Kutz v. United States, 168 Ct. Cl. 68, 77 (1964). As mentioned, the complaint in this case was filed on January 20, 1987. Defendant has not specifically responded to this aspect of

---

5/ (cont'd)
Correction Board has failed to grant an applicant appropriate monetary relief. In the present case, as discussed above, the Board did not act arbitrarily or illegally in denying plaintiff's claims for promotion, retirement credit points and back pay. The Board's actions did not resurrect plaintiff's claims or create a new time period for the running of the state of limitations.

plaintiff's suit. 6/ Thus, further discussion and analysis are required regarding this matter.

Accordingly, it is ORDERED:

(1) Defendant will have 30 days from the date of this order to file a supplemental brief in response to plaintiff's claim that he is entitled to an additional increment, based on years of service, to the payments he

---

6/ In plaintiff's response of September 4, 1988, plaintiff states that he did not specifically pray for longevity adjustment to his Army Reserve and National Guard pay, but it can be inferred in paragraphs 2 and 7 of the prayers and demands section of the complaint." In paragraph (2), plaintiff asks for "damages in the amount plaintiff would have been compensated had he fully participated in the USMC Reserves from the time of his discharge from active duty to the present;" and paragraph (7) requests "other" relief as may be just and equitable.

has received for active duty service in the U.S. Army National Guard/Reserve and whether the statute of limitations bars further consideration of this claim or any part thereof;

(2) Plaintiff will then have 15 days from the date of receipt of any response filed by defendant to file a supplemental brief in response;

(3) Upon the final conclusion of this matter, judgment shall be entered dismissing the complaint, except with respect to the matter referred to in (1) which remains to be considered and resolved;

(4) Plaintiff's cross-motion for summary judgment, except as it relates to the matter referred to in (1) above, which remains to be considered, is denied.

James F. Merow
Judge

IN THE UNITED STATES CLAIMS COURT

No. 25-87C

(Filed: May 5, 1989)

DAVID LARRY FRASER

v.

THE UNITED STATES

ORDER

Plaintiff moves for an enlargement of time to seek reconsideration of the order of April 3, 1989. Plaintiff also seeks a stay of defendant's obligation to respond to the cited order.

However, by its submission filed May 2, 1989, defendant has responded to the order.

In the above circumstances, it is ORDERED:

(1) The time for plaintiff to seek reconsideration of the order of April 3, 1989 is enlarged to and including May 13, 1989;

(2) A response to any reconsideration motion filed by plaintiff shall be filed by defendant within 20 days after its service.

James F. Merow
Judge

IN THE UNITED STATES CLAIMS COURT

No. 25-87C

(Filed August 17, 1989)

DAVID LARRY FRASER

V.

THE UNITED STATES

ORDER

Plaintiff has moved for reconsideration of the court's order of April 3, 1989, dismissing his complaint except with respect to a claim for back pay in relation to his active duty service in the U.S. Army National Guard/Reserve. Defendant has opposed plaintiff's motion.

Plaintiff requests reconsideration on bases he has already presented before the court. He offers no new evidence or legal support for his position that the court has not recognized the Board for Correction of Naval Records (Board) failed in its legal obligation to fully correct

errors and injustices in his record after the Board recommended plaintiff's reinstatement into the U.S. Marine Corps Reserve (USMCR).[1] Although the Board decided that his discharge should be cancelled,[2] it denied his other requests relating to promotion, retirement points

---

[1] Plaintiff had been honorably discharged from the Reserve on November 16, 1971, because he had been in an inactive duty status in excess of three years. Plaintiff had requested the Board to correct his records to invalidate his 1971 discharge, to be reinstated in the Reserve and to be compensated for loss of related pecuniary benefits.

---

[2] Plaintiff was subsequently tendered a commission in the grade of Captain.

and compensation for loss of pecuniary benefits. Thus, plaintiff contends, and has previously contended before this court, that the Board acted illegally because he was not granted the full relief he requested.

As was discussed in the April 3, 1989 order, since plaintiff sought relief from the Correction Board, he is bound by the Board's determination unless he can demonstrate the Board's decision lacked validity because it was "arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, or money is due." See Sanders v. United States, 219 Ct. Cl. 285, 298, 594 F.2d 804, 811 (1979).

In essence, plaintiff argues the Board acted illegally and/or arbitrarily,

but cites to no statute, regulation or procedure entitling him to promotion, back pay and retirement credit based on the Board's authorization of a correction of his records to reflect cancellation of his 1971 discharge and his consequent reinstatement into a non-pay status.[3] In this regard, plaintiff claims that, upon his reinstatement, he was entitled to constructive

---

[3] Plaintiff argues that his reinstatement to the Inactive Status List (ISL) by the Board did not remedy the injustice he suffered when the USMCR had prevented him from participating in active duty for training, drills and correspondence courses which had then resulted in his discharge for inactivity. Thus, according to plaintiff, any remedy to make him "whole" would include credit for active duty participation, which he had requested to be allowed to perform but which he did not perform.

credit for active duty participation in the reserves throughout the period between the date of his discharge and the date of his reinstatement, which was authorized by the Assistant Secretary of the Navy, "as though he had never been discharged." However, since he cites to no legal or regulatory entitlement to reinstatement with credit for active duty participation which he did not perform,[4]

---

[4] Furthermore, he cites to no legal entitlement to be allowed to participate, as a reservist, in active duty training or drills upon his request. The basis of his claim, he contends, is not that his 1971 discharge was illegal but that he had received inaccurate information from the USMCR that he could not participate in active duty training or drills while living overseas. Since the Board recognized that plaintiff had not received complete, accurate information or advice, and plaintiff argues that, had he received correct information, he would have participated and fulfilled his active duty requirements, plaintiff contends the Board should have given him credit therefor. Plaintiff acknowledges that a Correction Board has discretion in this regard, i.e., it may determine "the true nature of an alleged injustice and * * * determine "the true nature of an alleged injustice and * * * take steps to grant thorough and fitting relief." (cont.)

Plaintiff's motion for reconsideration on this ground is not valid.

Plaintiff also restates his claim that he was prevented from participatin in active duty training and drills after his reimstatement into the USMCR because he had been put in the position of holding dual commissions by the Board's action, as he had joined the U.S. Army Reserve/National Guard in January 1976. Plaintiff contends the USMCR should have resolved any problems resulting therefrom. Instead, he was not allowed to participate as an active duty reservist and was

---

[4] (...continued)
Yee v. United States, 206 Ct. Cl. 388, 398, 512 F.2d 1383 (1975). Moreover, as mentioned, plaintiff does not argue there is specific legal entitlement to such credit. Therefore, plaintiff's contention that the court did not recognize the Board acted illegally in cancelling plaintiff's discharge but denying his other requests does not providea basis for reconsideration of the April 3, 1989 order.

ultimately discharged on July 13, 1987. This is not a new contention and does not provide a basis for granting plaintiff's reconsideration motion.[5] See, e.g., Prestex, Inc. v. United States, 4 Cl. Ct. 317 (1984) (order denying motion to reconsider) (post-opinion motions to reconsider are not favored especially where a party has had a fair opportunity to argue the point in issue).

---

[5] Plaintiff points out that the April 3, 1989 order mistakenly indicated that the Board did not grant certain of plaintiff's requests because of plaintiff's failure to resign from the Army National Guard/Reserve or his failure to request an interservice transfer. However, even assuming the Board's decision was not partially based on such an assumption and, furthermore, it was not plaintiff's responsibility to resolve his dual status dilemma, it does not follow from such assumptions, and plaintiff has not otherwise shown, that the Board acted arbitrarily and/or contrary to law in denying plaintiff's requests for promotion, retirement credits and compensation for active duty he did not perform.

Consequently, it is ORDERED:

(1) Plaintiff's motion for reconsideration is denied;

(2) Since defendant's response of August 10, 1989 contains the government's accounting of the monies to which Mr. Fraser would be entitled, on or before September 5, 1989, plaintiff shall file a response indicating any specific objection, if any, to the amount(s) stated.

James F. Merow
Judge

IN THE UNITED STATES CLAIMS COURT

No. 25-87C

(Filed: September 14, 1989)

DAVID LARRY FRASER

V.

THE UNITED STATES

ORDER

The order of April 3, 1989 indicated that plaintiff may be owned additional pay for service performed to reflect increased longevity based upon constructive service.

Defendant's response filed May 2, 1989 recognized that some additional back pay was owed. Defendant's response filed August 10, 1989 included a schedule of additional back pay. By his response filed September 12, 1989, plaintiff, generally, but not completely, agrees with the sums set forth by defendant.

In the above circumstances, it is ORDERED:

(1) Defendant is liable to plaintiff for additional back pay for services performed by plaintiff within the six years prior to the date suit was commenced herein, to the extent the pay actually received by plaintiff did not reflect plaintiff's constructive service longevity;

(2) The parties shall promptly confer to ascertain if agreement can be reached as to the sum involved so that a final judgment can be entered;

(3) If agreement as to the amount due plaintiff can be reached, a Status Report or stipulation so reporting shall be filed;

(4) Absent prior agreement, on or before October 14, 1989 a Status Report(s) shall be filed indicating the procedure(s) proposed to resolve the matter of the amount of additional pay due plaintiff

for his service actually performed within the statute of limitations period.

James F. Merow
Judge

IN THE UNITED STATES CLAIMS COURT

No. 25-87C

(Filed: October 24, 1989)

DAVID LARRY FRASER

V.

THE UNITED STATES

ORDER

The orders filed April 3, 1989 and August 17, 1989 determined that, with the exception of the question of entitlement to an additional increment of pay to reflect increased longevity based upon constructive service, plaintiff's complaint would be otherwise dismissed. Proceedings were then initiated to resolve the longevity pay issue raised.

Subsequently, defendant recognized that some additional back pay was owed to plaintiff and submitted a schedule supporting an additional payment of $1,484.65.

Plaintiff initially questioned the amount but, by the Status Report filed

October 16, 1989, notes that the amount will not be contested. The Status Report also notes issues plaintiff considers unresolved, but it is concluded that, as decided previously in the cited orders, plaintiff has establaished entitlement only to an additional increment in pay, for the service he actually performed, to reflect constructive service longevity. This sum is now agreed to be $1,484.65.

Thus, it is ORDERED that final judgment now be entered in favor of plaintiff in the amount of $1,484.65 for back pay owed, with all other claims to be dismissed, and no costs to be assessed.

_____

James F. Merow

Judge

UNITED STATES CLAIMS COURT

DAVID LARRY FRASER

VS No. 25-87C

THE UNITED STATES

At the Claims Court held in the City of Washington, on the 25th day of October, A.D. 1989, judgment was ordered to be entered as follows: that plaintiff recover of and from the United States the sum of $1,484.65 and all other claims are dismissed. No Costs.

A true copy of record.
In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 25th day of October, A.D. 1989.

Frank Peachtree,

Clerk, Claims Court

Attest: James F. Merow,
Acting Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5938

DAVID LARRY FRASER, PLAINTIFF-APPELLANT,

v.

THE UNITED STATES, DEFENDANT-APPELLEE.

DECIDED: July 24, 1990

Before NIES, Chief Judge,* PLAGER, Circuit Judge, and WILL, Senior Judge.**

PER CURIAM.

DECISION

The judgment of the Claims Court, Fraser v. United States, No. 25-87C (Cl. Ct. Oct. 25, 1989), awarding Plaintiff-Appellant Fraser $1,484.65 and dismissing all other claims is affirmed, on the basis of the Claims Court's opinion. See Banks v. Garrett, No. 89-1485 (Fed. Cir. February 9, 1990).

---

* Chief Judge Nies assumed the position of Chief Judge on June 27, 1990.

** The Honorable Hubert L. Will, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

90-5038

DAVID LARRY FRASER, PLAINTIFF-APPELLANT,

V.

THE UNITED STATES, DEFENDANT-APPELLEE.

JUDGMENT

ON APPEAL FROM THE UNITED STATES CLAIMS COURT IN CASE NO(S). 25-87 C. THIS CAUSE HAVING BEEN HEARD AND CONSIDERED, IT IS ORDERED AND ADJUDGED: AFFIRMED.

Entered by ORDER OF THE COURT

Francis X. Gindhart, Clerk

DATED Jul 24 1990

Issued as a Mandate: August 14, 1990.

UNITED STATES MARINE CORPS
2nd Marine Amphibious Brigade
4th Marine Division (REIN), FMF, USMCR
4400 Dauphine Street
New Orleans, Louisiana 70146

29 JUL 88

To Whom It May Concern:

The undersigned served as Commanding Officer, Marine Attack Helicopter Squadron-773 (HMA-773), USMCR from January 1980 until January 1982. This is to certify that, during this period, D. Larry Fraser made application to join the above unit. He was unable to join because of an unresolved administrative issue concerning his Army Reserve Status.

L. Taylor
Col. USMCR

Col. L. S. Taylor
47 South Prado
Atlanta, GA 30309

Application for Correction
of Military Records

ATTACHMENT #1 To DD Form 149, D. L. Fraser

10 JUN 79

" . . .

4. That I be compensated for loss of pecuniary benefits applicable to the periods under examination: . . . . "

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
WASHINGTON, D.C. 20380

11 Apr 1979

Mr. David L. Fraser
Stouffer Place, 26-8
Lawrence, Kansas 66044

Dear Mr. Fraser:

This is in response to your letter concerning reenstatement of your commission in the Marine Corps Reserve.

The Director, Judge Advocate Division, has advised that you may not be reinstated in the Marine Corps Reserve (as apposed to reappointment) because to do so would be in violation of the statute which forbids a person from holding a commission in two branches of the service at the same time. The Director, Judge Advocate Division, has further advised that a

conditional release from the National Guard would not suffice in that it would not sever you from your present status as a Chief Warrant Officer in the National Guard.

Therefore, the two options which remain available to you are those which have been described in previous correspondence, i.e. inter-service transfer as a CWO, resignation of your commission as a CWO in the guard and application for re-appointment in the Marine Corps Reserve.

Please be assured that your unique dilemma is understood and appreciated. However, I am sure that you recognize that we are bound by the statutes in matters such as these.

I regret that a more favorable response is not possible and trust that the above information will be of assistance to you in determining the course of action you

choose to pursue.

Sincerely,

H.C. Campbell
Head, Personnel Branch
Reserve Division
By direction of the Commandant
of the Marine Corps

Copy to:
Colonel D. W. SANTEE
Box 550
Lawrence, Kansas 66044